

Before the  
**FEDERAL COMMUNICATIONS COMMISSION**  
Washington, D.C. 20554

In the Matter of	)	
	)	
<b>BLOOMBERG L.P.</b>	)	MB Docket No. 11-104
Complainant	)	
v.	)	
	)	
<b>COMCAST CABLE COMMUNICATIONS, LLC</b>	)	
Defendant	)	
	)	
To: The Commission	)	

**APPLICATION FOR REVIEW**

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June 1, 2012

## EXECUTIVE SUMMARY

Bloomberg commends the work of the Media Bureau for its recognition of (i) the Commission's historic consideration of the special importance of news, and (ii) Comcast's egregious violations of the terms of the news neighborhooding condition included in the Comcast-NBC Universal *Merger Order*. Given Comcast's public posturing that it plans to file an Application for Review, however, Bloomberg feels compelled to file an Application for Review to preserve its position on a limited number of matters and to mitigate future efforts by Comcast to avoid its obligations to carry Bloomberg Television ("BTV").

The Bureau's decision not to require Comcast to carry BTV in all news neighborhoods conflicts with the plain terms and intent of the news neighborhooding condition. In the end, the news neighborhooding condition is simple – if "a neighborhood" exists, then independent news channels must be included in "that neighborhood." Nothing in the language of that condition limits the application of the news neighborhooding condition when the Comcast headend contains multiple news neighborhoods nor permits Comcast to exclude BTV from any news neighborhood. In addition, in its *Complaint Order*, the Bureau did not address a number of Bloomberg's key arguments and did not adequately explain what evidence it relied upon in reaching a decision.

Moreover, the Bureau's decision to allow Comcast to determine the neighborhood where Bloomberg will be placed fails to consider the Commission's finding that (i) Comcast has the increased ability and incentive to favor its affiliated networks as a result of the merger and (ii) the unique nature and importance of preserving independent news justified a condition that protected and preserved independent news irrespective of the complaint process.

In addition, the Bureau fails to provide a reasoned explanation for its conclusion that Bloomberg's analysis did not include all of the news channels carried on Comcast's headends. Specifically, the Bureau fails to explain how an analysis of Current TV's and Link TV's program line-

ups could meet the Commission's definition of a news channel, which is defined as a network "whose programming is focused on public affairs, business, or local news reporting and analysis during the hours from 6:00 a.m. through 4:00 p.m. in the U.S. Eastern Time Zone." Nor does the Bureau dispute Bloomberg's evidence which demonstrates that neither of these two channels can meet this definition.

In light of the foregoing, Bloomberg appreciates the Bureau's efforts to resolve Bloomberg's complaint but respectfully requests that the Commission direct Comcast to carry immediately BTV in all news neighborhoods as defined by the *Complaint Order*, and to provide the requested clarifications herein.

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**APPLICATION FOR REVIEW**

Bloomberg L.P. (“Bloomberg”) hereby files this Application for Review of the Order released by the Media Bureau (“Bureau”) on May 2, 2012, in the above-captioned docket (“*Complaint Order*”).<sup>1</sup> The *Complaint Order* granted in large part Bloomberg’s complaint and directed that Comcast Cable Communications, LLC (“Comcast”) “carry Bloomberg [Television] in a news neighborhood on certain headends, and direct[ed] Comcast to file more information to confirm the facts necessary to determine whether relief is appropriate on other headends.”<sup>2</sup>

Bloomberg commends the Bureau for its recognition of (i) the Commission’s historic consideration of the special importance of news, and (ii) Comcast’s egregious violations of the terms of the news neighborhooding condition included in the Comcast-NBC Universal Merger Order (“*Merger Order*”).<sup>3</sup> Given Comcast’s public posturing that it plans to file an Application for Review, however, Bloomberg feels compelled to file an Application for Review to preserve its position on a

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<sup>1</sup> *Bloomberg, L.P. v. Comcast Cable Communications, LLC*, Memorandum Opinion and Order, DA 12-694 (MB May 2, 2012) (“*Complaint Order*”).

<sup>2</sup> *Id.*, ¶ 2.

<sup>3</sup> *Applications of Comcast Corp., General Electric Company and NBC Universal Inc. for Consent to Assign Licenses and Transfer Control of Licenses*, Memorandum Opinion and Order, 26 FCC Rcd 4238 (2011) (“*Merger Order*”).

limited number of matters and to mitigate future efforts by Comcast to avoid its obligations to carry Bloomberg Television (“BTV”) in its news neighborhoods. While Bloomberg respectfully requests that the Commission consider and grant the relief Bloomberg requests herein, Bloomberg notes that the primary issues raised in this Application for Review affect less than 15% of the headends.<sup>4</sup> Therefore, Bloomberg believes the Commission can and should continue to require Comcast to move forward with the relief granted in the *Complaint Order*, particularly in light of the time-limited nature of the *Merger Order* conditions.<sup>5</sup>

## **I. INTRODUCTION AND BACKGROUND**

Nearly 18 months ago, the Commission approved, with conditions, the assignment and transfer of broadcast, satellite, and other radio licenses from the General Electric Company to Comcast. Comcast willingly accepted the Commission’s conditional approval of the Merger.<sup>6</sup> The conditions that Comcast voluntarily accepted included the so-called “news neighborhooding” condition, whereby “if Comcast now or in the future carries news and/or business news channels in a neighborhood....”<sup>7</sup> Comcast is required to carry all independent news channels in those news neighborhoods. To date, Comcast has yet to carry BTV on most news neighborhoods found on its cable systems as required by the news neighborhooding condition contained in the *Merger Order*.

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<sup>4</sup> Reply of Bloomberg L.P. to Answer of Comcast Cable Communications, LLC, *Bloomberg L.P. v. Comcast Communications, LLC*, MB Dkt. No. 11-104, at 46 (filed Aug. 30, 2011) (“Bloomberg Reply”).

<sup>5</sup> *Complaint Order*, ¶¶ 26 & 27.

<sup>6</sup> Letter from Kathryn A. Zachem (Comcast Corp.), Ronald A. Stern (General Electric Co.), and Richard Cotton (NBC Universal, Inc.) to Marlene H. Dortch, Secretary, Federal Communications Commission, MB Dkt. No. 10-56 (filed Jan. 21, 2011) (“Consistent with Section 1.110 of the Commission’s Rules Applicants accept as binding the conditions and enforceable commitments included in the MO&O and expressly waive any right they may have to challenge the Commission’s legal authority to adopt and enforce such conditions and commitments (reserving, of course, their right to challenge the interpretation or application of those conditions and commitments in particular circumstances).”) (“Comcast Merger Letter”).

<sup>7</sup> *Merger Order* at 4288.

The Commission found the Merger in the public interest only if it was subject to specific conditions to protect independent news programmers. In recognition of the special importance of news, the Commission adopted a news neighborhooding condition to prevent Comcast from discriminating against unaffiliated news networks, like BTV, that compete with the news networks, including CNBC, that Comcast acquired from General Electric.

Specifically, the news neighborhooding condition requires that:

**If Comcast now or in the future carries news and/or business news channels in a neighborhood**, defined as placing a significant number or percentage of news and/or business news channels substantially adjacent to one another in a system's channel lineup, **Comcast must carry all independent news and business news channels in that neighborhood.**<sup>8</sup>

After Comcast refused BTV's request to be carried in the then existing news neighborhoods, Bloomberg filed a Complaint with the Commission on June 13, 2011.<sup>9</sup> Bloomberg requested that the Commission order Comcast to move BTV to every grouping of four news channels within a group of five adjacent channel positions on any headend located in the top 35 Nielsen Designated Marketing Areas ("DMAs").<sup>10</sup>

After an extensive pleading cycle, and nearly 11 months after Bloomberg filed its Complaint, the Bureau issued the *Complaint Order* in which it found that "Bloomberg has demonstrated that on at least some of its systems, Comcast neighborhoods news channels on certain headends and does not carry BTV in a neighborhood on those headends, as required by the news neighborhooding condition of the *Merger Order*."<sup>11</sup> The Bureau further concluded that:

(i) the condition is not limited to channel lineups constructed after approval of the transaction, but also applies to lineups present on Comcast's cable systems

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<sup>8</sup> *Id.* (emphasis added).

<sup>9</sup> Complaint, *Bloomberg, L.P. v. Comcast Cable Communications, LLC*, MB Dkt. No. 11-104 (filed June 13, 2011) ("Complaint").

<sup>10</sup> *Id.* at 22.

<sup>11</sup> *Complaint Order*, ¶ 5.

at the time the [*Merger Order*] was released, as well as to future lineups; (ii) a grouping containing four news or business news channels within a cluster of five adjacent channel positions qualifies as a “significant number of news or business news channels” for purposes of the news neighborhooding condition; (iii) the term “news channel” in the condition refers to general interest or news programming and not to specialty news channels dedicated to a sub-genre of news programming (such as channels devoted to sports or weather news) or Public, Educational, and Governmental access channels (“PEG”); and (iv) for purposes of compliance with the condition, Comcast is obligated to carry an independent news programming channel in at least one news neighborhood, but is not required to carry a particular network channel in all news neighborhoods, or in a particular neighborhood, or in one consolidated news neighborhood.<sup>12</sup>

Accordingly, the Bureau directed Comcast, with respect to headends in the top-35 DMAs, to:

(i) within sixty days of the release of this [*Complaint Order*], carry [BTV] in a news neighborhood on any headend that carries [BTV], has a news neighborhood as defined herein, and does not include [BTV] within a news neighborhood.<sup>13</sup>

The Bureau explained that the Commission would address any disputes over whether a specific channel qualifies as a “news channel” on a case-by-case basis, but the *Complaint Order* did not provide any detail about such a dispute process.<sup>14</sup>

Bloomberg greatly appreciates the work of the Bureau on the *Complaint Order* and its recognition of Comcast’s egregious violations of the terms of the news neighborhooding condition included in the *Merger Order*. Given Comcast’s public statements that it plans to file an Application for Review, Bloomberg is compelled to file an Application for Review to preserve its position on a limited number of matters and to mitigate future efforts by Comcast to avoid its obligation to carry

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<sup>12</sup> *Id.*

<sup>13</sup> *Id.*, ¶ 6. In addition, the Bureau directed Comcast to: “[p]rovide to Bloomberg and the Commission a list of those headends that are subject to the requirements of subparagraph (i);” and “[p]rovide to Bloomberg and the Commission channel lineup information about any headend listed in response to subparagraph (ii) that already carries [BTV] within a news neighborhood” within 14 business days after the release of the *Complaint Order*. *Id.*

<sup>14</sup> *Id.*

BTV in its news neighborhoods. Therefore, Bloomberg respectfully requests that the Commission consider and grant Bloomberg's requested relief.

## II. RELIEF REQUESTED

The Commission must direct Comcast to carry BTV in all news neighborhoods in order to prevent Comcast from discriminating against independent news programming.<sup>15</sup> In addition, especially because the news neighborhooding condition is only effective for five-and-one-half more years, Bloomberg requests that the Commission clarify certain aspects of the *Complaint Order* set forth herein in order to avoid further delay in implementing the relief in the *Merger Order*.

## III. STANDING

Section 1.115(a) of the Commission's rules states that "[a]ny person aggrieved by any action taken pursuant to delegated authority may file an application requesting review of that action by the Commission."<sup>16</sup> Bloomberg filed the complaint that the Bureau's *Complaint Order* granted in part.<sup>17</sup> Therefore, Bloomberg is aggrieved by the *Complaint Order* and has standing to file this Application for Review.

## IV. QUESTIONS FOR REVIEW

1. Whether the *Complaint Order* incorrectly interpreted the plain language and intent of the *Merger Order* in ruling that BTV should not be carried in all news neighborhoods?

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<sup>15</sup> Bloomberg's Complaint dealt exclusively with the placement of its standard definition feed and Bloomberg reserves the right to seek further relief in the event that Comcast fails to honor the requirement that it place in news neighborhoods all independent news channels, such as BTV for its high definition feed ("HD"). The Commission has held that the HD channel feeds are different from the SD feed. *AT&T Servs., Inc. & Southern New England Tel. Co. d/b/a AT&T Connecticut v. Madison Square Garden, L.P. & Cablevision Sys. Corp., Order*, 26 FCC Rcd 13206, 13209 (MB 2011) ("[C]onsumers do not consider the standard definition ("SD") version of a particular channel to be an adequate substitute for the HD version due to the different technical characteristics and sometimes different content.").

<sup>16</sup> 47 C.F.R. § 1.115(a).

<sup>17</sup> *Complaint Order*, ¶ 1.

2. Whether the Bureau erred by allowing Comcast to choose BTV's channel position which fails to address the anticompetitive effect of channel placement?

3. Whether the Bureau erred by not concluding BTV is entitled to carriage in all news neighborhoods on each headend on a multi-headend system?

4. Whether the *Complaint Order* incorrectly failed to include a mechanism for seeking clarification from the Bureau to determine which channels are news channels?

5. Whether the *Complaint Order* failed to provide a reasoned explanation for its conclusion regarding what constitutes news channels?

## **V. STANDARD OF REVIEW**

Section 1.115 of the Commission's rules compels that the Commission grant an application for review and reverse a Bureau decision when a Bureau commits one of the following errors:

1. The action taken pursuant to delegated authority is in conflict with the statute, regulation, case precedent, or established Commission policy.
2. The action involves a question of law or policy that has not previously been resolved by the Commission.
3. The action involves application of a precedent or policy which should be overturned or revised.
4. An erroneous finding as to an important or material question of fact.
5. Prejudicial procedural error.<sup>18</sup>

This Application for Review is appropriate because the Bureau's *Complaint Order* involves questions of law and policy which the Commission has not yet addressed, includes certain erroneous findings, and contains actions that are contrary to Commission's precedent or policy.

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<sup>18</sup> 47 C.F.R. § 1.115(b)(2).

## VI. ARGUMENTS

### A. Comcast Must Carry BTV In All News Neighborhoods Consistent With The Plain Language And Purpose Of The News Neighborhooding Condition

The Bureau's decision not to require Comcast to carry BTV on all news neighborhoods conflicts with the plain terms and intent of the news neighborhooding condition and is arbitrary and capricious. In the end, the news neighborhooding condition is simple – if “a neighborhood” exists, then independent news channels must be included in “that neighborhood.” Nothing in the language of that condition limits its application when the Comcast headend contains multiple news neighborhoods and nothing in the language of the condition would permit Comcast to exclude BTV from any news neighborhood. In addition, in its *Complaint Order*, the Bureau did not address a number of Bloomberg's key arguments and did not adequately explain what evidence it relied upon in reaching a decision.

The Bureau interprets the neighborhooding condition to require that, for those headends with multiple news neighborhoods, Comcast carry BTV in only one of its news neighborhoods. The Bureau reasoned that the condition “does not require Comcast to place the same news channel in multiple neighborhoods.”<sup>19</sup> The Bureau based its decision on the erroneous conclusion that Comcast would face “major realignments of its channel lineups” if it required Comcast to carry BTV in all neighborhoods or let Bloomberg choose the neighborhood in which to be placed.

The Bureau's conclusion is incorrect for a number of reasons. The Bureau's interpretation of the condition conflicts with the plain language of the *Merger Order*. The conclusion fails to consider the purposes of the neighborhooding condition. The Bureau also failed to consider the record evidence regarding the importance of independent news channels' location in a primary neighborhood and evidence that it would not be unduly burdensome on Comcast.

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<sup>19</sup> *Complaint Order*, ¶ 20.

**1. For neighborhoods identified, the condition expressly requires independent news to be carried “in that neighborhood.”**

First, the Bureau’s application of the condition is inconsistent with the plain language of the condition. The full text of the condition is:

If Comcast now or in the future carries news and/or business news channels in **a** neighborhood, defined as placing a significant number or percentage of news and/or business news channels substantially adjacent to one another in a system’s channel lineup, Comcast must carry all independent news and business news channels in **that** neighborhood.<sup>20</sup>

The plain language dictates that if “a neighborhood” exists, then independent news channels must be carried in “that neighborhood.” Here, the Bureau has correctly concluded that Comcast has neighborhooded its own news channels. The condition, however, is clear that once a news neighborhood has been identified, independent news channels must be carried “in that neighborhood.” The *Complaint Order* reads this phrase out of the condition. Such an interpretation conflicts with the plain language and is inconsistent with the Commission’s stated concerns. When adopting this condition, the Commission expressly described the condition as “relat[ing] to channel placement for independent news channels.”<sup>21</sup> As the FCC had explained, it was concerned that Comcast could disadvantage networks by “placing the network...on a less advantageous channel number (making it more difficult for subscribers to find the programming).”<sup>22</sup> Surely this was the harm the Commission was in part trying to ameliorate when it described its condition as relating to “channel placement for independent news.”<sup>23</sup> The Bureau’s interpretation provides that independent news channels be grouped together, but fails to address the Commission’s stated concern with equitable “channel placement.” The plain language of the condition, however, would

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<sup>20</sup> *Merger Order* at 4288, ¶122 (emphasis added).

<sup>21</sup> *Id.* at 4287-4288, ¶122.

<sup>22</sup> *Id.* at 4285, ¶ 116.

<sup>23</sup> *Id.* at 4287, ¶ 122.

guarantee that independent news be placed in “that neighborhood” which had been created, thus fully addressing the Commission’s concern.

In other portions of the *Complaint Order*, the Bureau adheres to a plain language analysis. For example, with respect to the application of the condition to existing neighborhoods, the Bureau found “the condition is triggered if Comcast ‘now ... carries’ news channels in a neighborhood. Comcast’s argument that the condition applies only to future lineups would read out of the condition the term ‘now ... carries’ and, thus, would be contrary to the Commission’s intent... .”<sup>24</sup> The Bureau is required to adhere to the “plain language” of the condition here as well but failed to do so.<sup>25</sup>

Moreover, as explained in Bloomberg’s Reply, an interpretation limiting the condition to one neighborhood would ignore the basic rule of construction that the singular generally includes the plural.<sup>26</sup> Indeed, this rule of construction appears at the very beginning of the U.S. Code: “In determining the meaning of any Act of Congress, unless the context indicates otherwise – words importing the singular include and apply to several persons, parties, or things.”<sup>27</sup> Curiously, the

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<sup>24</sup> *Complaint Order*, ¶ 8.

<sup>25</sup> See *Lamie v. United States Trustee*, 540 U.S. 526, 534 (2004) (“The starting point in discerning congressional intent is the existing statutory text.... [W]hen the statute’s language is plain, the sole function of the courts - at least where the disposition required by the text is not absurd - is to enforce it according to its terms.”) (internal citations and quotes omitted); *Ardestani v. INS*, 502 U.S. 129, 135-136 (1991) (Indeed, there is a “strong presumption” that “the plain language of the statute expresses congressional intent,” and this presumption is rebutted “only in rare and exceptional circumstances . . . when a contrary legislative intent is clearly expressed.”) (internal quotations and citations omitted); *United States v. Lanier*, 520 U.S. 259, 267 n.6 (1997) (“The legislative intent of Congress is to be derived from the language and structure of the statute itself . . . .”).

<sup>26</sup> See, e.g., *Public Citizen, Inc. v. Mineta*, 340 F.3d 39, 54 (2d Cir. 2003) (“The TREAD Act’s ‘a tire’ plainly means one tire, two tires, three tires, or all four tires, under the elementary rule of statutory construction that the singular ... includes the plural.”).

<sup>27</sup> 1 U.S.C. § 1.

Bureau does not indicate that it gave due consideration to Bloomberg's arguments explaining why the condition should be read to include the plural.<sup>28</sup>

Assume, for example, that the Commission had adopted the following condition: "If Comcast now or in the future carries CNBC on *a system*, it must also carry all unaffiliated business news channels on *that system*." Notwithstanding the use of the singular form, such a condition would not be interpreted to apply only if Comcast carried CNBC on a single system. Rather, it obviously would be interpreted to mean that unaffiliated business news channels must be carried on any system where CNBC is carried. The same is true with the news neighborhooding condition at issue here; independent news channels must be included in any news neighborhood that Comcast carries.

Indeed, in another condition contained in the *Merger Order*, the Commission clearly used the terms "a" and "that" to refer to the plural as well as the singular. Specifically, the Commission adopted a set-top box condition that employs the same "if/then" structure as the news neighborhooding condition: if a Comcast set-top box has "a capability that enables a customer to access *a Specialized Service*," then "the requirements of Section IV.E.1 & 2 shall apply to *that Specialized Service*."<sup>29</sup> Clearly, this condition is not limited to situations in which a set-top box enables a customer to access only "one" Specialized Service, but instead also applies if a set-top box enables a customer to access multiple Specialized Services. If a set-top box enables a customer to access multiple Specialized Services, the conditions set forth in Section IV.E.1 & 2, which limit Comcast's ability to discriminate in the offering of Specialized Services, would clearly apply to each and every Specialized Service accessible by the set-top box. Any other interpretation of the condition would

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<sup>28</sup> Bloomberg Reply at 41-43.

<sup>29</sup> *Merger Order* at 4363 (App. A, Sec. IV.F) (emphasis added).

be wholly illogical. The Bureau's failure to address Bloomberg's arguments does not meet the standards of reasoned decisionmaking.<sup>30</sup>

The Bureau claims that the fact that Bloomberg proposed language for the condition (which was not adopted) stating that Comcast must "carry all independent news and business news channels in that AND ALL SUCH neighborhoods"<sup>31</sup> means that the Commission did not intend to require Comcast to carry BTV in all news neighborhoods.<sup>32</sup> As Bloomberg explained in its Reply, Bloomberg did not make this suggestion because it believed that the language of the condition was restricted to a single neighborhood or was likely to be interpreted as such.<sup>33</sup> Rather, Bloomberg accurately anticipated that the "singular vs. plural" argument may arise in the future and understandably attempted to eliminate the need to respond to it in the event that Comcast failed to comply with the condition.<sup>34</sup> In short, through its suggested edit, Bloomberg was not attempting to change the meaning of the news neighborhooding condition, but rather to secure additional clarity.<sup>35</sup>

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<sup>30</sup> See, e.g., *Allentown Mack Sales & Serv., Inc. v. NLRB*, 522 U.S. 359, 374 (1998) ("The Administrative Procedure Act, which governs the proceedings of administrative agencies and related judicial review, establishes a scheme of 'reasoned decisionmaking.' Not only must an agency's decreed result be within the scope of its lawful authority, but the process by which it reaches that result must be logical and rational. Courts enforce this principle with regularity when they set aside agency regulations which, though well within the agencies' scope of authority, are not supported by the reasons that the agencies adduce." (internal citations omitted)).

<sup>31</sup> Letter from Markham C. Erickson, Counsel for Bloomberg, to Marlene H. Dortch, Secretary, Federal Communications Commission, MB Dkt. No. 10-56 (filed Jan. 19, 2011) (emphasis added).

<sup>32</sup> *Complaint Order* at n.72.

<sup>33</sup> Bloomberg Reply at 44.

<sup>34</sup> *Id.* at 42-43.

<sup>35</sup> See, e.g., *Shook v. D.C. Fin. Responsibility & Mgmt. Assistance Auth.*, 132 F.3d 775, 782 (D.C. Cir. 1998) ("Sometimes Congress drafts statutory provisions that appear preclusive of other unmentioned possibilities - just as it sometimes drafts provisions that appear duplicative of others - simply, in Macbeth's words, 'to make assurance double sure.'"). Moreover, what matters is the Commission's text, not what the parties may have advocated during the proceeding. See *Checkovsky v. SEC*, 23 F.3d 452, 489 (D.C. Cir. 1994) ("Agency opinions, like judicial opinions, speak for themselves.").

In any event, the fact that the Commission did not include Bloomberg's suggested change to the language in the condition does not mean that the Commission intended for the condition to be met by allowing Comcast to place BTV on a secondary news neighborhood apart from CNBC. The Commission, for example, might have thought that it was unnecessary to make such a change near the end of the process because the language of the condition was clear. Or, given that Bloomberg's proposed change was contained in *ex parte* letters that were submitted into the record both on the day that the *Merger Order* was adopted and the day after the *Merger Order* was adopted, most or all of the Commissioners may not have been aware of Bloomberg's proposed change when they cast their votes so they did not consciously decide to reject Bloomberg's suggestion.

At bottom, the Bureau simply claims that the Commission did not intend to require carriage of independent news channels in all news neighborhoods on a system,<sup>36</sup> but does not point to specific language in the condition that supports this assertion. To the contrary, the plain language of both the news neighborhooding condition and the *Merger Order* discussing the condition requires that BTV be placed in "that neighborhood" which had been identified.

**2. The purpose of the condition supports a requirement that independent news be carried in "that neighborhood" with Comcast-owned news.**

The Bureau's decision also fails to consider the purpose of the neighborhooding condition. The Commission found that conditions were necessary to find the merger in the public interest because:

Comcast's large subscriber base potentially allows it to limit access to customers for any network it wishes to disadvantage by either denying carriage or, with a similar but lesser competitive effect, placing the network in a less penetrated tier or on a less advantageous channel number (making it more difficult for subscribers to find the programming). In doing so, Comcast can reduce the viewership of competing video programming networks, which in turn could render these networks less attractive to advertisers, thus reducing their revenues and profits. As a result, these unaffiliated networks may compete less aggressively with NBCU networks, allowing the latter to

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<sup>36</sup> *Complaint Order*, ¶¶ 17 & 18.

obtain or (to the extent they may already possess it) maintain market power with respect to advertisers seeking access to their viewers.<sup>37</sup>

For the Bureau to permit Comcast to comply with the condition by carrying BTV on a secondary neighborhood only addresses one of the purposes of the news neighborhooding condition – “that Comcast could neighborhood its newly affiliated news channels while isolating independent news channels outside of any neighborhood.”<sup>38</sup> The Bureau’s *Complaint Order*, however, completely fails to address the anticompetitive effect of such channel placement by allowing independent news to be grouped with lesser watched channels in remote and still isolated channel positions.

On Comcast headends with more than one neighborhood, there is generally one neighborhood located below channel 100 that contains the principally viewed news channels such as CNN, CNBC, Fox News, Headline News, and MSNBC, and another neighborhood above channel 100 with channels such as BTV, Fox Business Network, C-SPAN2, and C-SPAN3.<sup>39</sup> The purpose of the news neighborhooding condition is not served by including BTV in the latter neighborhood and excluding it from the former neighborhood given that Comcast’s news channels (and the most watched and lucrative news channels) are included in the neighborhood that is located below channel 100.<sup>40</sup> As one of Bloomberg’s experts in the Complaint proceeding noted, the difference is “similar to the neighborhood we all hope to live in, versus the less desirable one. One is a preferred neighborhood, where viewers are likely to spend quality time (rather than rarely visit).”<sup>41</sup> Thus, if

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<sup>37</sup> *Merger Order* at 4285, ¶ 116.

<sup>38</sup> *Complaint Order*, ¶ 21. As discussed further, *infra.*, the condition was also designed to ameliorate Comcast’s increased ability and incentive to favor its affiliated networks as a result of the merger.

<sup>39</sup> *Complaint*, Ex. F, ¶ 14.

<sup>40</sup> *See* Bloomberg Reply at 16-17.

<sup>41</sup> *Id.*, Ex. D, ¶ 23.

BTV and other independent news channels are not included in “that neighborhood,” then they remain isolated from the most popular news channels, and from Comcast-affiliated news channels.<sup>42</sup>

This interpretation fails to consider the importance of placing independent news channels in the most viewed neighborhoods and similarly fails to recognize the importance of BTV’s location in relation to its largest competitor, CNBC, which is now affiliated with Comcast. With this reasoning in mind, the importance of the Commission directing Comcast to carry BTV in each news neighborhood is clear. Absent such a result, the neighborhooding condition will not fulfill its role in protecting independent news and the public interest from merger-specific harm.

**3. The evidence demonstrates that Comcast would not be overly burdened as it frequently changes channel lineups and consumers gain significant benefits from independent news channels being included in “that neighborhood” Comcast has created.**

The Bureau’s decision not to “require Comcast to carry such channels in every news neighborhood” appears to turn on the following sentence: “Such a reading is not plain on the face of the condition’s language and would unduly burden Comcast without obvious consumer gain.”<sup>43</sup> However, the Bureau does not explain how it reached this conclusion or provide an analysis of the alleged “burdens.” Instead, it just makes a statement in a subsequent paragraph that “Comcast could face major realignment of its channel lineups.”<sup>44</sup>

First, as the Bureau appropriately concluded elsewhere, Comcast accepted the burden this condition imposes. Comcast raised the specter of burden in attempting to avoid application of the condition to any current neighborhoods. The Bureau was appropriately unpersuaded, however, as Comcast has acquiesced to any such burden by agreeing to the condition. So, here too, Comcast has agreed to any burden of the condition by accepting it. In fact, in seeming contradiction of its

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<sup>42</sup> *Id.*, Ex. D, ¶ 18.

<sup>43</sup> *Complaint Order*, ¶ 20 (emphasis added).

<sup>44</sup> *Id.*, ¶ 21.

statement about the burden here, elsewhere the Bureau explained that “[i]f Comcast thought the condition was too burdensome, it had the option to refuse to agree to the condition.”<sup>45</sup>

The Bureau also fails to address the arguments in Bloomberg’s Reply that Comcast greatly exaggerated any burdens associated with implementing the news neighborhooding condition.<sup>46</sup> The complaint record contains substantial evidence that Comcast greatly exaggerated the burdens associated with implementing the neighborhooding condition.<sup>47</sup> Comcast changed its channel lineups over 10,000 times in less than a year, indicating that changing channel positions is not burdensome.<sup>48</sup> Even in channels 1-99, which Comcast claimed are particularly difficult to move, channel lineup moves or changes occurred more than 1,700 times in the same time period.<sup>49</sup> Moreover, Comcast did not provide evidence to support its claim that meaningful engineering work would be necessary.<sup>50</sup> Any associated cost would be insignificant when compared to the value of the merger.<sup>51</sup> Comcast accepted these burdens<sup>52</sup> and the *Merger Order* does not indicate that the Commission agreed with Comcast’s description of the burdens or the difficulty of realigning its channel lineups.

Similarly, Comcast is not burdened by carrying the same channels in multiple locations on a headend. Comcast already carries many channels at multiple locations on its systems.<sup>53</sup> When

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<sup>45</sup> *Id.*, ¶ 23, n.85.

<sup>46</sup> *See* Bloomberg Reply at 50-74.

<sup>47</sup> *Id.* at 3, 64-68.

<sup>48</sup> *Id.* at 69.

<sup>49</sup> *Id.*

<sup>50</sup> *Id.* at 64-65.

<sup>51</sup> *See* Comcast Answer at 42-43; Press Release, Comcast and GE, Comcast and GE to Create Leading Entertainment Company (Dec. 3, 2009) *available at* [http://www.comcast.com/nbcutransaction/pdfs/Press%Release\\_Final\\_12.03.09.pdf](http://www.comcast.com/nbcutransaction/pdfs/Press%Release_Final_12.03.09.pdf).

<sup>52</sup> Comcast Merger Letter at 1.

<sup>53</sup> Bloomberg Reply, Ex. A, ¶ 61-67.

Bloomberg filed its Reply in the complaint proceeding, Comcast carried a network in more than one location on a headend in 17,758 instances.<sup>54</sup> At that time, moreover, in 4,783 cases, Comcast carried a network at a location below channel 100 and another location above channel 100.<sup>55</sup> Not surprisingly, the two networks that most commonly received such treatment are both affiliated with Comcast: ShopNBC and Style. ShopNBC is carried on a location below channel 100 and a second location above channel 100 on 203 Comcast headends, while Style is similarly carried on 161 headends.<sup>56</sup>

Moreover, the Order does require Comcast to move BTV into at least one news neighborhood, the Bureau fails to address how there is any more burden on the channel lineup by allowing BTV to pick the neighborhood in which to be placed.<sup>57</sup>

The Bureau further appears to have discounted the evidence presented by Bloomberg about the benefits of the news neighborhooding condition for consumers. For example, as industry expert David Goodfriend explained, “the addition of other new[s] channels into the existing

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<sup>54</sup> *Id.*, Ex. A, ¶ 63. This figure does *not* count instances where Comcast carries the SD feed of a channel in one location, and the HD feed in another location. *Id.* at n.9.

<sup>55</sup> *Id.*, ¶ 66.

<sup>56</sup> *Id.*, ¶ 67.

<sup>57</sup> Letter from Stephen Díaz Gavin, Counsel for Bloomberg, to Marlene H. Dortch, Secretary, Federal Communications Commission, MB Dkt. No. 10-56 at 3 (filed Sept. 30, 2010). While the plain terms of the new neighborhooding condition require carriage on all news neighborhoods, in those instances where two standard definition news neighborhoods exist on a Comcast headend, Bloomberg would agree to be carried only in the neighborhood that includes CNBC. As Bloomberg has contended since the Merger proceeding, its original objective in pursuing a neighborhooding condition was to secure carriage for BTV wherever CNBC was carried. *See, e.g.*, Bloomberg Petition to Deny at iii, *Applications of Comcast Corp., General Electric Company and NBC Universal Inc. for Consent to Assign License*, MB Dkt. No. 10-56 (filed June 21, 2010). This outcome is consistent with the purpose of the news neighborhooding condition and “the special importance of news programming to the public interest.” *Merger Order* at 4287, ¶ 122. Specifically, requiring carriage of BTV in the neighborhood that includes CNBC is consistent with the Commission’s recognition in the *Merger Order* that “Comcast’s ability to disadvantage or foreclose carriage of a rival programming network can harm competition” and Comcast’s MVPD market share “gives Comcast an ability not possessed by pre-transaction NBCU to disadvantage rival networks that compete with NBCU networks” (like BTV). *Id.* at 4285, 4286-87, ¶ 119.

neighborhoods on Comcast headends will be a benefit to consumers as it will become a larger neighborhood with news channels grouped more logically and news channels will be easier to find.”<sup>58</sup> In the long run, Comcast’s customers will benefit from expanded news neighborhoods where more channels will be organized by genre. Similarly, the Bureau stated but did not fully explain why it concluded that reading the news neighborhood condition as requiring carriage in all neighborhoods “could create the perverse result of discouraging Comcast from carrying independent news and business news channels -- a result clearly inconsistent with the intent of the news neighborhooding condition and the merger conditions overall.”<sup>59</sup> The Bureau did not provide further explanation for how it reached this conclusion.

Finally, Bloomberg also is concerned that Comcast may try to create a news neighborhood by adding channels to BTV’s current location in order to avoid having to add BTV to an existing news neighborhood that includes its affiliated channels, like CNBC. The Commission has cautioned Comcast not to create such artificial channel groupings to evade the news neighborhooding requirement.<sup>60</sup> Bloomberg expects that the Bureau would find such actions to be discriminatory and a violation of the merger conditions. However, such complaints are burdensome on the complaining party and the Commission. Further, while the Bureau has pledged to move quickly on such matters, the Commission’s complaint process can take significant time and, therefore, would allow Comcast to further push closer to the seven-year term limit on these conditions without actually having to comply with them.<sup>61</sup> In the end, the promise of quick action on an affiliation-based discrimination complaint is insufficient relief. Moreover, it is not what the *Merger Order* requires, nor does it reflect the terms of the condition to which Comcast agreed. The Commission

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<sup>58</sup> Bloomberg Reply, Ex. C, ¶ 21.

<sup>59</sup> *Complaint Order*, ¶ 21.

<sup>60</sup> *Id.*, ¶ 20.

<sup>61</sup> Bloomberg Reply at 4.

needs to order Comcast to carry BTV in all news neighborhoods or, at a minimum, in the same news neighborhoods as Comcast-affiliated business news channels.

**B. Allowing Comcast To Choose BTV's Channel Position Fails To Consider The Commission's Findings That Comcast Has Increased Ability And Incentive To Favor Its Affiliated Networks As A Result Of The Merger**

The Bureau's decision to allow Comcast to determine the neighborhood where Bloomberg will be placed fails to consider the Commission's finding that (i) Comcast has the increased ability and incentive to favor its affiliated networks as a result of the merger and (ii) the unique nature and importance of preserving independent news justified a condition that protected and preserved independent news irrespective of the complaint process. In the *Merger Order*, the Commission specifically found that:

[T]he combination of Comcast ... with NBCU ... will result in an entity with increased ability and incentive to ... disadvantage rival networks that compete with NBCU networks. Comcast ... [may] limit access to customers for any network it wishes to disadvantage by either denying carriage or, with a similar but lesser competitive effect, placing the network in a less penetrated tier or on a less advantageous channel number (making it more difficult for subscribers to find the programming). In doing so, Comcast can reduce the viewership of competing video programming networks, which in turn could render these networks less attractive to advertisers, thus reducing their revenues and profits. As a result, these unaffiliated networks may compete less aggressively with NBCU networks ....<sup>62</sup>

Given the extensive findings in the *Merger Order* that Comcast would have both the incentive and ability to disadvantage rival networks by placing them in inferior channel positions or programming tiers, the Bureau's decision to allow Comcast to determine which neighborhood BTV is placed is illogical. Moreover, it undermines the protection that independent news channels are

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<sup>62</sup> The Commission found significant evidence in the record to support its conclusions. "These conclusions are supported by the evidence set forth in the Technical Appendix that Comcast may have in the past discriminated in program access and carriage in favor of affiliated networks for anticompetitive reasons. These conclusions also are supported by our analysis of the consequences of this transaction for the structure of programming markets." *Merger Order* at 4284-85.

guaranteed without having to file a discrimination complaint.<sup>63</sup> The Bureau's decision is arbitrary and capricious because it fails to consider the Commission's reasoning for adopting the condition. The Commission must "examine the relevant data and articulate a satisfactory explanation for its action including a rational connection between the facts found and the choices made."<sup>64</sup> Therefore, the Bureau erred in failing to consider the reasons the Commission adopted the condition, and the harm it was trying to ameliorate. As a result, the Bureau's decision to allow Comcast to decide in which neighborhood BTV is placed is arbitrary and capricious and implementation of the condition as set forth by the Bureau will not adequately protect the public interest.

**C. For Systems With Multiple Headends, BTV Must Be Carried In Each News Neighborhood On Each Headend**

The Commission should clarify that BTV must be carried on each headend's news neighborhood in a multi-headend system. This issue arises because of footnote 2 of the *Complaint Order*, which states:

The condition references the term "system's channel lineup", but Bloomberg's complaint analyzes channel lineups on a headend-by-headend basis. *See* Complaint at Exhibit H. Comcast did not challenge Bloomberg's analysis of the lineups on a headend-by-headend basis, and therefore we presume that the system/headend distinction in this context is irrelevant, perhaps because the systems at issue are single-headend systems.<sup>65</sup>

Bloomberg agrees with the Bureau that the distinction between systems and headends is irrelevant in this context, and it appears that Comcast agrees as well, given that it has similarly provided channel lineup data on a headend-by-headend basis.<sup>66</sup> Comcast has not objected to

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<sup>63</sup> 47 C.F.R. § 76.1300-1302.

<sup>64</sup> *Motor Vehicle Mfrs. Ass'n of U.S. Inc. v. State Farm Mut. Auto Ins. Co.*, 463 U.S. 29, 43 (1983) (internal quotation marks and citations omitted).

<sup>65</sup> *Complaint Order* at n.2.

<sup>66</sup> Bloomberg Reply at 21-29; *Complaint Order* at n.2

Bloomberg's use of headend-by-headend data.<sup>67</sup> However, because some of the systems in question are multi-headend systems, Bloomberg is compelled to raise this issue to ensure it is not foreclosed from future arguments should Comcast at some point seek to claim that it only has to carry BTV on one of the headends in a multi-headend system.

**D. The Commission Should Not Require That Another Complaint Be Filed To Clarify Which Channels Are News Channels**

The *Complaint Order* states that the Bureau will resolve disputes between Comcast and Bloomberg over whether a channel is a general news or business news channel for purposes of determining if a news neighborhood exists.<sup>68</sup> The Bureau did not specify the mechanism for bringing such disputes and requests for clarifications to the Bureau.<sup>69</sup> Bloomberg appreciates the Bureau's diligence in acting on Bloomberg's Complaint but asks the Commission to specify which channels constitute news channels under the *Merger Order* to determine if a news neighborhood exists. The Bureau erred when it failed to specify either which channels satisfy the news channel definition or what procedures the parties should follow to obtain the stated relief. Moreover, the filing of an additional carriage complaint on this issue would be overly burdensome for independent news programmers.

**E. The Complaint Order Does Not Provide A Reasoned Explanation For Its Conclusion Regarding What Constitutes News Channels**

In the *Complaint Order*, the Bureau found that "Bloomberg's analysis does not include all of the news channels carried on Comcast's headends."<sup>70</sup> The Bureau fails to provide a reasoned explanation or analysis for its conclusion, and cites only to a single footnote "comparing" exhibits in Bloomberg's Complaint and Comcast's Answer to argue that "Bloomberg excluded news channels

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<sup>67</sup> *Complaint Order* at n.2.

<sup>68</sup> *Id.* at nn. 22 & 57.

<sup>69</sup> *Id.*, ¶ 6 & nn. 22 & 57.

<sup>70</sup> *Id.*, ¶ 16.

like BBC World News, Current TV, Link TV, and MHz Worldview from its analysis.”<sup>71</sup> In reaching this conclusion, however, the Bureau ignores Bloomberg’s analysis of Current TV’s and Link TV’s program line-ups in the complaint proceeding.<sup>72</sup>

The *Merger Order* referred to news channels as networks “whose programming is focused on public affairs, business, or local news reporting and analysis during the hours from 6:00 a.m. through 4 p.m. in the U.S. Eastern Time Zone.”<sup>73</sup> As Bloomberg noted in its Reply, most of Current TV’s programming, including its content between 6:00 a.m. and 4:00 p.m., consists of documentaries exploring a wide variety of topics, not news reporting or analysis.<sup>74</sup> The channel’s focus is not on public affairs, business, or local news, and it is not considered to be a news channel by those in the MVPD industry.<sup>75</sup> Bloomberg’s Reply also clarifies that Comcast mistakenly identified Link TV as a news channel even though the network only characterizes a minority of its programming as “news and current affairs,” and it carries movies and music programming.<sup>76</sup> Bloomberg submitted evidence that Link TV does not focus on public affairs, business, or local news reporting or analysis between 6:00 a.m. and 4:00 p.m., and that Link TV is not generally considered to be a news channel by those in the MVPD industry.<sup>77</sup>

Thus, Bloomberg did not exclude “news channels like ... Current TV [and] Link TV ... from its analysis,” as the Bureau indicates in the *Complaint Order*.<sup>78</sup> Rather Bloomberg analyzed and

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<sup>71</sup> *Id.* at n.60.

<sup>72</sup> Bloomberg Reply at 28 & 29; Bloomberg, Opposition to Motion for Leave to File Surreply, *Bloomberg L.P. v. Comcast Cable Communications, LLC*, MB Dkt. No. 11-104, at 11 (filed Oct. 7, 2011).

<sup>73</sup> *Merger Order* at n. 292.

<sup>74</sup> *Id.* at 28 (citing Ex. B, ¶ 26; Ex. F, ¶ 25).

<sup>75</sup> *Id.*

<sup>76</sup> Bloomberg Reply at 29 (citing Ex. C, ¶ 34; Ex. F, ¶ 28).

<sup>77</sup> *Id.*

<sup>78</sup> *Complaint Order* at n.60.

concluded these channels failed to meet the Commission’s definition. The Bureau either failed to consider Bloomberg’s detailed review that Current TV and Link TV did not fit the Commission’s definition of a news channel, impermissibly modified the definition, or incorrectly applied the definition.<sup>79</sup>

If the Bureau concluded that BBC World News, Current TV, Link TV, and MHz Worldview are news channels and not merely examples of channels that Bloomberg excluded from its analysis, the Bureau failed to provide any technical basis for its decision. To the extent that the Bureau did conclude that they are news channels, it cannot simply relegate a critical decision to a single footnote in the *Complaint Order* without any further justification or meaningful analysis of the evidence proffered by Bloomberg.<sup>80</sup>

## VII. CONCLUSION

**WHEREFORE**, in light of the foregoing, Bloomberg appreciates the Bureau’s efforts to resolve Bloomberg’s complaint but respectfully requests that the Commission direct Comcast to

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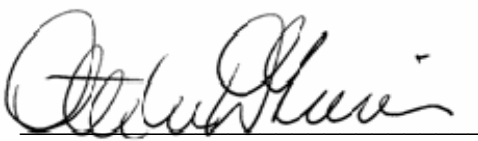
<sup>79</sup> *Complaint Order* at ¶ 15 (adding phrase “of general interest”). In addition, as Bloomberg explained, if the Commission overturns the Bureau’s decision that four within five channels constitute a significant number of news channels, the Commission must also resolve the question of which channels are news channels to determine what is a “significant percentage.” *See also Bloomberg Opposition to Motion for Leave to File Surreply* at 7-11.

<sup>80</sup> *MCI Telecomms. Corp. v. FCC*, 57 F.3d 1136, 1141 (citing *PPG Indus. Inc. v. Costle*, 659 F.2d 1239, 1250 (1981) (“The importance of the issue was belied by the obscurity of the footnote intended to give notice”); *cf. McElroy Elec. Corp. v. FCC*, 990 F.2d 1351, 1366 (D.C. Cir. 1993) (warning the FCC to refrain from the practice of putting the “heart” of its orders in footnotes.); *see also Gerber v. Norton*, 294 F.3d at 173, 181 (D.C. Cir. 2002) (“Our cases make clear that an agency may not turn the provision of notice into a bureaucratic game of hide and seek.”) (internal quote and citation omitted); *American Radio Relay League, Inc. v. FCC*, 524 F.3d 227 (D.C. Cir. 2003) (finding that the Commission failed to satisfy the notice and comment requirements of the Administrative Procedures Act by redacting studies on which it relied in promulgating a rule and failed to provide a reasoned explanation for its choice); *Connecticut Light & Power Co. v. NRC*, 673 F.2d 525, 530 (D.C. Cir. 1982) (“To allow an agency to play hunt the peanut with technical information, hiding or disguising the information that it employs is to condone a practice in which the agency treats what should be a genuine interchange as mere bureaucratic sport.”).

carry BTV in all news neighborhoods, or in the alternative, carry BTV in each news neighborhood where Comcast carries CNBC, and to provide the requested clarifications herein.

Respectfully submitted,

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Dated: June 1, 2012

**CERTIFICATE OF SERVICE**

I, Carly T. Didden, certify on this 1<sup>st</sup> day of June, 2012, a copy of the foregoing Application for

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